IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 323

EDWARD H. COOLIDGE, JR.,
Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

PETITION OF THE STATE OF NEW HAMPSHIRE FOR REHEARING

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On June 21, 1971, the Court decided this case. The judgment of the court below, sustaining the conviction of petitioner Coolidge for first degree murder, was reversed and the case ordered remanded to the Supreme Court of New Hampshire. Now the State of New Hampshire prays that rehearing be ordered.

The Court's reversal of the Supreme Court of New Hampshire expressly presupposes not only that the search warrant in question was constitutionally insufficient but also that the search was invalid in the absence of a warrant. Consideration of the particular rules for judging the seizure and search as

warrantless is contained in parts II A-C of the opinion of the Court by Mr. Justice Stewart. Beyond their significance for this case, these portions of the opinion are of immediate practical importance for the administration of the law of search and seizure by law enforcement officials, for they concern the criteria by which the constitutional need for warrants is to be judged. There are sharp disagreements within the Court with respect to the meaning of *Chambers* v. *Maroney*, 399 U.S. 42 (1970), and the substance of the plain view doctrine, dealt with, respectively, in parts II B and C of the opinion. Only four members of the Court joined in these parts of the opinion. Mr. Justice Harlan, the fifth member of the Court necessary for the result reached, did not concur in these portions of the opinion. The footnote to Mr. Justice Harlan's concurring opinion suggests, further, that he would have joined with the four dissenting justices in affirming the conviction, had he applied the holding of *Williams* v. *United States*, ___U.S.___ (1971), with the agreement of five justices of the Court, that *Chimel* v. *California*, 395 U.S. 752 (1969), is not retroactive. And with respect to the continued application of the exclusionary rule against the states in search and seizure cases, Mr. Justice Harlan expressed the view that *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and *Ker* v. *California*, 374 U.S. 23 (1963), should be overruled.

Thus, the judgment below is reversed, though the following conclusions are true.

(A) Less than a majority agree on those points of law which are most crucial to this case and most significant for determining and judging state and federal action in the future. In the context of the disagreement within the Court, those portions of the Court's opinion which represent only the views of a plurality cannot furnish reliable guides for the future.

(B) In order to concur in the present judgment of the

Court, the fifth justice must decline to apply a recent holding of the Court.

(C) That same justice calls for an end to the application of the exclusionary rule against the states, the necessary presupposition of the reversal presently rendered in this case. Hence, a majority of the Court individually favor rules under which the judgment of the Court should be opposite to what it now is.

It is submitted that in these circumstances the result presently reached by the Court should not stand, and that a rehearing should be granted to provide the following means of reaching a different result.

1. We respectfully submit that Mr. Justice Harlan should join with the present four dissenters on the grounds (a) that the Court has held that *Chimel* v. *California,* 395 U.S. 752 (1969), is not to be applied retroactively and (b) that under pre-*Chimel* law the seizure in question was valid. While this course would not settle disagreement over the holding of *Chambers* v. *Maroney,* 399 U.S. 42 (1970), or over the content of the plain view doctrine, it would be action consistent with the holding of the Court in *Williams* v. *United States* ____U.S.____ (1971), it would produce the result which Mr. Justice Harlan and the four dissenting justices ideally favor, and it would avoid what we submit is presently an unnecessary reversal in a very serious case. This action could not result in any weakening of rules applicable against federal officers, because it would be grounded on what is already the holding in *Williams* v. *United States, supra,* on the subject of retroactivity. In so urging Mr. Justice Harlan to apply the holding in *Williams* v. *United States, supra,* it is submitted that we urge that justice to do as he has done in applying *Mapp* v. *Ohio,* 367 U.S. 643 (1961), despite his views at the time its rule was adopted and despite his present position on the undesirability of that rule. And it is submitted that we urge

no more than that justice has imposed upon himself in finding that he was not ". . . free to decide the present cases consistently with [his] . . . own views . . . which have not commended themselves to most . . ." members of the Court. *Mackey* v. *United States*, ____U.S.____ (1971), Harlan, J., concurring and dissenting (p. 11 of preliminary print).

2. We respectfully submit that Mr. Justice Harlan should join with the present dissenters from the plurality view either of the holding of *Chambers* v. *Maroney*, 399 U.S. 42 (1970), or of the content of the plain view doctrine. It is submitted that those justices are correct who have dissented in this case from the plurality portions of the opinion, either on the ground that the seizure and search were valid under the rule in *Chambers* or on the ground that the discussion of the plain view doctrine does not rightly conceive the law of the past and unsettles the law for the future. The doubt which surrounds these points as a result of the present division over the plurality portions II B and C of the Court's opinion is detrimental to the practical action which law enforcement officers and state and lower courts must take. To clarify either of them would help to settle the law for the future with very practical significance for both federal and state action. If *Mapp* v. *Ohio*, 367 U.S. 643 (1961), is not now to be overruled, the issues on these disputed points cannot be avoided. And to join with present dissenters on these points would, again, avoid what five members of the Court presently believe to be an ultimately unnecessary reversal of a state judgment.

3. We respectfully submit that the Court should choose on rehearing that very course of action which Mr. Justice Harlan advocates in his concurring opinion: the overruling of *Mapp* v. *Ohio*, *supra*, and *Ker* v. *California*, 374 U.S. 23 (1963). We do not take lightly, in raising this possibility, the dissenting opinion of Mr. Chief Justice Burger in *Bivens*

v. *Six Unknown Federal Narcotics Agents*,____U.S.____ (1971), in which he proposes that a new alternative to the suppression doctrine be developed before the doctrine is abandoned. And we are mindful that no majority of the Court has declared in favor of abandoning the doctrine. But we urge for reasons given below that as to state cases the doctrine be abandoned now.

As applied against the states, the exclusionary rule is constitutionally infirm. While the Court in *Mapp* v. *Ohio*, 367, U.S. 643 (1961), rested its application of the rule to the states on constitutional authority, it was only 12 years before, in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), that it had been held that the Fourteenth Amendment did not forbid the introduction of evidence taken in violation of it. Today there is no unanimity of opinion, as opinions in this case demonstrate. The constitutional basis for the rule is thus not immune from re-examination and clarification.

Such a constitutional posture invites consideration of reasons for and against the continued application of the rule against the states. We will not belabor now what the Court well knows, that recent writing on measurable effects of the rule are available for the Court's consideration. But we would emphasize one point for which the very opinions of this Court since *Mapp v. Ohio, supra,* are evidence.

Judgments about the constitutional standards applicable to state searches and seizures are judgments which must be made by law enforcement officers who are not lawyers and who are called upon to take action without the luxury of time for extended reflection. These officers cannot successfully, or reasonably, be called upon to apply rules of law which are so complicated as to require subtle legal analysis or so subject to disagreement over content as to destine the results of analysis to doubt. We raise these twin spectres not for the sake of polemic but as a preface to a conclusion to be drawn below from the disagreement within the Court itself.

We ask the Court to consider the disagreement in *Spinelli* v. *United States,* 393 U.S. 410 (1969), between Mr. Justice Harlan and Mr. Justice Black. This disagreement concerned the content of the relevant law before *Spinelli;* it was not confined to disagreement over what the law should be. The same kind of disagreement can be seen in the present case, as opinions now stand, between Mr. Justice Stewart and Mr. Justice Black over the content of the rules as to search and seizure incident to arrest before and after *Chimel* v. *California,* 395 U.S. 752 (1969), over the holding in *Chambers* v. *Maroney,* 399 U.S. 42 (1970), and over the content of the plain view doctrine. Each of these examples illustrates disagreement over what the law is, quite apart from any disagreement over what the law ought to be. What is primarily significant in each instance is not the relative merits of opposing positions but the very existence of such disagreement within the Court over the legal facts of what the law is or has been.

With great respect, we are bound to submit that these illustrative disagreements within the Court indicate the absence of sufficiently clear rules to be applied successfully in the context of law enforcement by those who are not trained as lawyers and who cannot depend on advice in specific situations from trained lawyers with opportunity for reflection. Given the nature of the subject itself, there is no reason to believe that now-difficult rules are likely to be simplified and that disagreement will cease. But instead of taking such conclusions as counsels of despair or as statements of historical necessity, we urge the Court to take them as reasons for concluding that *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and the cases that have followed it have needlessly penalized the process of administering the national Constitution and the good faith enforcement of the criminal law by the states. We thus urge the Court to take these conclusions as reasons for overruling *Mapp* v. *Ohio, supra,* now.

This case presents the issues inherent in the reexamination of *Mapp* v. *Ohio,* 367 U.S. 643 (1961), as squarely as any case can, and the Court itself has not spared any emphasis of the importance of the result in this particular case. Though the immediately available state remedies of damage actions are wholly satisfactory to no one, they are more satisfactory than continuing uncertainty to state convictions and reversals of them. And while the Court may wait upon the national Congress or upon the states to develop a better alternative, it may as well be that the action of the Court in overruling *Mapp* v. *Ohio, supra,* will prove to be the necessary and sufficient inducement to complementary action by the coordinate governments and branches of government in the republic.

CONCLUSION

For these reasons we urge the Court to grant this petition for rehearing.

Respectfully submitted,

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I certify that the foregoing petition is presented in good faith and not for delay.

DAVID H. SOUTER

July 12, 1971